APR 18 2003

STATE OF WISCONSIN | CIRCUIT COURT BRANCH 1 | MARATHON COUNTY

MARJORIE BEYERSDORF,

Plaintiff,

vs.

Case No. 02-CV-894

WISCONSIN DEPARTMENT OF COMMERCE,

Defendant.

DECISION AND ORDER

INTRODUCTION

In this action for judicial review of an administrative decision, the plaintiff alleges that the administrative decision was wrong on the merits and that the procedure by which the decision was reached violated the statutes and her due process rights.

The plaintiff owned property involved in an environmental clean-up, and she sought reimbursement from the Department of Commerce under the Petroleum Environmental Cleanup Fund Act (PECFA). *See* §101.143, Stats. The Department of Commerce paid reimbursement in the amount of $63,462.18, but denied $825 associated with packing materials inserted to prevent surface water from seeping into the groundwater monitoring well, plus an additional $109 that the Department later agreed to reimburse. The plaintiff appealed the Department's decision to an administrative law judge (ALJ) in the Department, who ruled for the Department. The plaintiff thereafter sought review in circuit court.

The plaintiff contends that the ALJ's decision is erroneous for four reasons. First, the plaintiff argues that the ALJ's ex parte communication with a Department employee and her

failure to advise the parties of that communication warrant reversal. Second, the plaintiff argues that the ALJ's ex parte communication was barred by statute. Third, the plaintiff argues that the decision was wrong on the merits. Fourth, the plaintiff argues that the expedited hearing process applied in the administrative proceedings violated due process.

In response, the Department contends that reversal is not appropriate. The Department argues that the plaintiff received due process in the expedited hearing procedure, and moreover, that she waived any objection by failing to raise it at the hearing. The Department further argues that the final decision was correct on the merits and that the ALJ's "out-of-hearing conversation" with a Department employee did not impair the fairness or correctness of the result.

BACKGROUND

After the Department denied $825 of the plaintiff's PECFA claim for reimbursement, she appealed the decision and obtained a hearing before Administrative Law Judge Mari Samaras-White on July 30, 2002. This was an "expedited hearing," upon which a time limit of one hour was imposed.[1] The issue at the hearing concerned whether the $825 for packing should have been included in the driller's bid and whether it qualified for the $1,000 exemption from the bid process. At the conclusion of the hearing, the ALJ indicated that a written decision would be issued within a few weeks.

On August 1, 2002, two days after the hearing, the ALJ initiated a conversation with Department employee Eric Scott. This conversation lasted for two to two and a half hours, although the topics under discussion related to at least two different cases.[2] According to Mr.

---

[1] The basis for this one-hour time limit is unclear. The administrative code contains no provision for such a time limit. *See* §Comm 47.53, Wis. Adm. Code.

[2] The record contains a copy of a memo that the ALJ placed in three hearing files, including this one, in which she refers to her discussion with Eric Scott. The Department attached copies of the petitions for review in the other two cases to its brief in this case. The plaintiff has also provided the court with a copy

Scott, the conversation "began with general information and became specific to sets of facts." In particular, the ALJ asked Mr. Scott "how the rule provision covering exemption from commodity bidding of costs under $1,000 is applied," she asked "about placing 'packing' during monitoring well construction," and she asked "if packing would be included in a bid from a driller." Mr. Scott stated, "It was apparent to me that she was asking my interpretation of facts associated with a specific claim."

On August 7, 2002, the attorney representing the Department in the administrative hearing sent a letter to the plaintiff's representative to advise the representative of the ALJ's discussion with Eric Scott and of her failure to disclose that discussion as provided by statute. In the letter, Assistant Legal Counsel John Kisiel identified Eric Scott as a member of the Department's "Claim Review section" and stated his belief that the ALJ's conversation with Scott "should be considered as an ex parte contact."

On September 2, 2002, the ALJ issued her decision in this case. With regard to the issue of her discussion with Eric Scott, she wrote, "The information to which the Administrative Law Judge had access did not influence or have any bearing on the Administrative Law Judge's decision. Any action regarding the Administrative Law Judge's discussion with the PECFA senior hydro geologist is not warranted, appropriate or necessary." The ALJ then concluded that the $825 packing cost was required to be included in the driller's bid, and that the failure to either include the amount in the bid or seek pre-approval or waiver from the Department before incurring the cost rendered it unreimbursable. The ALJ also ruled that the $825 packing cost did not fall within the $1,000 exemption to the bidding process because it was part of a single

---

of the trial court decision in one of those other cases, although the results of those separate proceedings have no bearing here.

"overall commodity service," and that interpreting the exemption as argued by the plaintiff "would essentially undermine the program's bidding process."

ANALYSIS

I. Due process and expedited hearing

The Department argued that, because the plaintiff did not object to the expedited hearing procedure at the hearing, that objection must be deemed waived. The plaintiff did not offer any further argument on the fairness of the expedited hearing in her reply brief.

Generally, an issue must be raised before the administrative agency in order to be preserved for appeal; the failure to so raise an issue generally constitutes waiver. *Bunker v. LIRC*, 2002 WI App 216, ¶15, 257 Wis. 2d 255, 265-66, 650 N.W.2d 864. However, this rule is one of administration, not power; under the proper circumstances, a reviewing court may consider legal issues not raised before the administrative agency. 257 Wis. 2d at 266. In other words, the plaintiff's failure to object to the expedited procedure at the administrative hearing did not necessarily make waiver a foregone conclusion.

However, by failing to respond to the Department's waiver argument, the plaintiff conceded that application of the waiver rule is appropriate. *See Charolais Breeding Ranches v. FPC Securities*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

II. Ex parte communication

There is no dispute that the ALJ had an off-the-record conversation with Eric Scott and that she did not advise the parties about the substance of that conversation. What is in dispute is whether the ALJ violated §227.50, Stats., and if so, whether the violation warrants remanding the case for further administrative proceedings. All of the parties' arguments regarding the communication are framed in terms of compliance with the statute.

Administrative decision-makers are prohibited from having ex parte communications relative to the merits of a contested case with "[a]n official of the agency or any other public employee or official engaged in prosecution or advocacy" or with a person having a substantial interest in the proposed agency action, either directly or indirectly, including the parties themselves. §227.50(1)(a)1.-2., Stats. This prohibition does not apply to "an advisory staff which does not participate in the proceeding." §227.50(1)(b), Stats. If any prohibited ex parte communication occurs, the administrative decision-maker is required to place the communication on the record and give the parties an opportunity to rebut it if they desire to do so. §227.50(2), Stats.

In its response brief, the Department argued that there was no statutory violation and even if there were, it does not require remanding the case to the agency. The Department noted that "the ALJ felt the contact was within the Wis. Stat. §227.50(1)(d) exception of communications with advisory staff[.]" This would have rendered the communication proper and the disclosure under §227.50(2), Stats., unnecessary. However, the Department did not rely on that argument, contending instead that remand to the agency is not appropriate because neither the fairness of the procedure nor the correctness of the result were impaired. *See* §227.57(4), Stats. The Department contended that the fairness of the procedure was not impaired because the notification of the ex parte communication was accomplished by Mr. Kisiel's letter, and therefore the parties had an opportunity to present rebuttal. The Department also contends that the communication was "beneficial, not prejudicial" to the plaintiff, since at one point, Mr. Scott had remarked that he would pay the packing cost if it had been an unexpected cost.

Whether there was any statutory violation is a closer issue than it would appear at first blush because there is room to argue whether Eric Scott falls within any of the prohibited categories. If Mr. Scott falls within none of these categories, then under the statute, it is irrelevant whether he should be considered "advisory staff," since the contact would not be considered an ex parte communication within the meaning of §227.50, Stats. He is not an "official of the agency"; at most, he would be an employee of the agency. Since he did not directly participate in the administrative proceedings, he does not qualify as an "employee . . . engaged in prosecution or advocacy in connection with a matter under consideration." Finally, Mr. Scott was not a "party in the proceeding," he was merely an employee of a party, and it does not seem that he would have any particular interest in the outcome of the administrative proceedings, let alone a "substantial interest." However, an agency like the Department of Commerce cannot act except through its employees, and the Department certainly did have a substantial interest in the proceedings. Thus, the ALJ's conversation with Eric Scott was an ex parte communication with a party in the proceeding, in violation of §227.50, Stats.[3] The ALJ was required to report that conversation to the parties and provide them with a document memorializing the content of the conversation; her failure to do that is also a violation of §227.50, Stats.

Moreover, the ALJ's ex parte communication raises concerns beyond violation of §227.50, Stats. Although the parties limited their arguments to whether the statute was violated, it seems that the more fundamental issue is whether the ALJ's conversation with Eric Scott

[3] The Court does not find that the "advisory staff" exception applies to Eric Scott. At various points in the record, Mr. Scott is referred to as a PECFA site reviewer, a member of the PECFA claim review section (although he says in his affidavit that he is not a claim reviewer) and as the PECFA senior hydrogeologist. In an administrative proceeding to review denial of a PECFA claim, such a person should be regarded as aligned with one side, not as a neutral advisory person. If the testimony of such a person is significant, it should be presented as part of the hearing, not in a private off-the-record meeting.

violated the plaintiff's constitutional right to due process. Seeking out information not contained in the record and not presented in the parties' presence constitutes a serious due process problem.

"Due process in an administrative proceeding is really a question of the presence or absence of 'fair play,' and [courts] have recognized that fair play includes 'the right to be heard by counsel upon the probative force of the evidence adduced by both sides and upon the law applicable thereto.'" *Union State Bank v. Galecki*, 142 Wis. 2d 118, 126, 417 N.W.2d 60 (Ct. App. 1987) (citations omitted). "Clearly, it is improper for an administrative agency, when acting in a quasi-judicial capacity, to base a decision or finding upon evidence or information obtained without the presence of and notice to the interested parties, and not made known to them prior to the decision." *State ex rel. Cities Service.Oil Co. v. Board of Appeals*, 21 Wis. 2d 516, 539, 124 N.W.2d 809 (1963). To show a due process violation, a litigant must show proof of the ex parte communication and bias or an impermissibly high risk of bias. *Sills v. Walworth County Land Mgt. Comm.*, 2002 WI App 111, ¶44, 254 Wis. 2d 538, 567, 648 N.W.2d 878 (citing *Union State Bank*, 142 Wis. 2d at 126-27).

Here, as noted above, the fact that the communication between the ALJ and Eric Scott is clearly shown by the record and it is undisputed. The record also clearly shows that the substance of the conversation included the ALJ's specific requests for information related to the plaintiff's claim.[4] That the information influenced the ALJ's decision can be inferred from the fact that the ALJ sought out the information in the first place. This satisfies the element of an impermissibly high risk of bias, and thus, a due process violation.

Thus, the ALJ's ex parte communication with a member of the Department's PECFA staff violated not only §227.50, Stats., but also the plaintiff's constitutional right to due process.

---

[4] This we know from the affidavit of Eric Scott. The record would, of course, be clearer if it had included the type of disclosure from the ALJ contemplated by §227.50(2), Stats.

These bases give sufficient cause for this court to order that the ALJ's decision be reversed and remanded. However, the administrative decision will not be remanded, for the reasons set forth below.

III. Decision on merits

In concluding that the $825 cost did not fall under the $1,000 bidding exemption, the ALJ stated, "the packing costs were associated with unanticipated drilling activities. The service provider who was retained to drill was the same one who inserted the packing materials. . . . The packing occurred while drilling was ongoing." The ALJ then concluded that the packing and drilling were one indivisible "commodity service," and that interpreting the bid exemption otherwise would "essentially undermine the program's bidding process." The ALJ's interpretation of the bid exemption rule is not reasonable.

The bidding requirement, set forth in §Comm 47.33(3), Wis. Adm. Code, is at odds with the ALJ's ruling. The ALJ's reasoning requires that any connected activities be treated as a single commodity item, rather than allowing separate but related activities to be considered separate commodity items. The plain language of the rule, however, contemplates that connected activities can be separate commodity items. In listing the commodity items that must be bid, the rule separately lists "[e]xcavation of petroleum-contaminated soils;" "[t]rucking of petroleum-contaminated soils or backfill material;" and "[b]ackfill material." §Comm 47.33(3)(a), (b), (e), Wis. Adm. Code. Under the ALJ's reasoning, excavating and trucking soil would be nothing more than "individual components of an overall commodity service." Indeed, carried to its extreme, the ALJ's reasoning would require that the entire clean-up operation be treated as one unit rather than separate commodity items.

By failing to recognize that the $825 packing cost could properly be separated from the cost of drilling and installing the monitoring well, the ALJ misapplied the $1,000 bid exemption rule. Under §Comm 47.33(5)(a), Wis. Adm. Code, "[c]ommodity items with a purchase price of $1,000 or less shall be exempt from the competitive bid requirement." The only limitation on this bid exemption is that it does not apply "if a service is to be used multiple times and the cumulative cost exceeds $1,000." *Id.* The packing cost at issue here was not used multiple times and does not exceed $1,000. Therefore, the exemption applies and no bid was required; the ALJ's ruling to the contrary was erroneous.

When a reviewing court finds that the administrative agency erroneously interpreted a provision of law, the court may remand the case to the agency for further proceedings under the correct interpretation of the provision of law or the court may set aside or modify the agency action. §227.57(5), Stats. Since a correct interpretation of the bid exemption provision compels payment of the $825 at issue here, it is unnecessary to remand this case. This court has the authority to modify the ALJ's order to require the Department to pay the plaintiff $825.

CONCLUSION

While the unfairness of the ex parte communication warrants remanding the case to the ALJ, remand is not necessary. Instead, the court can simply modify the ALJ's order to require payment of the $825 at issue, since such payment is compelled by a correct interpretation of the rules regarding the PECFA bid process and, in particular, the $1,000 bid exemption. However, the plaintiff's other issue, the fairness of the expedited hearing procedure, does not afford any basis for relief, since the plaintiff conceded the correctness of the Department's waiver argument by failing to respond to it.

THEREFORE, IT IS HEREBY ORDERED that the decision of ALJ Mari Samaris-White in this matter, issued September 2, 2002, is hereby modified to require the Department to reimburse the plaintiff, Ms. Beyersdorf, for the costs associated with the packing activities, for the reasons set forth above.

Dated this 15 day of April, 2003.

BY THE COURT:

HON. DOROTHY L. BAIN
Circuit Court Judge

cc: Attorney John M. Van Lieshout
Assistant Attorney General Stephen J. Nicks